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Supreme Court, U.S.
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No. 94-1520

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK W. FISHER, JR.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

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17 pp

## QUESTION PRESENTED

Whether a State legislature may prohibit intentional recording of a private individual's own telephone calls without the consent of all parties to the conversation?

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# BRIEF IN OPPOSITION BY RESPONDENT, COMMONWEALTH OF PENNSYLVANIA

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Respondent, Commonwealth of Pennsylvania, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Superior Court of Pennsylvania. That decision is not reported. It is set forth as Appendix B to the petition.

## STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which permits review by writ of certiorari of judgments of the highest state court in which "a decision could be had." Appeals as of right in noncapital cases in Pennsylvania are heard by the Superior Court, an intermediate appellate court. *See* 42 Pa. Cons. Stat. Ann. § 742 (Purdon 1981). Further review is by allowance of appeal to the Pennsylvania Supreme Court. *See* 42 Pa. Cons. Stat. Ann. § 724 (Purdon 1981). Where, as here, the highest state court declines to exercise its authority, the judgment of the intermediate court is the judgment reviewable under 28 U.S.C. § 1257 (a). *See Sullivan v. Texas*, 207 U.S. 416 (1908) and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968). For this reason, the petition for certiorari should have been sought to the Superior Court, not to the Pennsylvania Supreme Court.

Significantly, this Court is without jurisdiction to grant "review" where petitioner did not present his constitutional theory to the "highest court" in the State to rule on the merits. Allegations that the Pennsylvania Wiretapping and Electronic Surveillance Control Act violates the federal constitution were not presented to or ruled upon by the Pennsylvania courts. This Court will not consider federal issues not presented and ruled upon below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The rationale for this rule is based on principles of federalism as well as judicial economy.

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257,

> there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

*Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Similarly, this Court will not address a constitutional issue presented on a new legal theory. *Webb v. Webb*, 451 U.S. 493, 496-98 (1981) and *Picard v. Conner*, 404 U.S. 270, 278 (1971).

In the Pennsylvania courts, petitioner never raised the issue he now presents. He argued that ignorance of the law was a defense, not that the statute prohibiting wiretapping was unconstitutional. Petitioner acknowledges that he has not previously presented the constitutional challenge when he states: "Petitioner now presents this issue within the framework of a constitutional argument." Pet. at p. 6 (emphasis supplied).

Moreover, failure to raise the issue in the trial court would present a procedural bar to review in Pennsylvania. *See* Pa.R.A.P. 302 ("Issues not raised in the lower court are

waived and cannot be raised for the first time on appeal"); and *Commonwealth v. Hawkins*, 295 Pa. Super. 429, 441 A.2d 1308 (1982) (even issues of constitutional dimension cannot be raised for the first time on appeal).

This Court lacks jurisdictional to "review" the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act where no challenge to the constitutionality of the Act was presented or ruled upon below.

## STATEMENT OF THE CASE

Petitioner, Frederick W. Fisher, Jr. ("Fisher"), asks this Court to grant review and to declare unconstitutional the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. Ann. §§ 5701, *et seq.* (Purdon 1994, supp.) (hereinafter "Act"), which he has been convicted of violating. The respondent is the Commonwealth of Pennsylvania.

Pursuant to a warrant, the Office of Attorney General of Pennsylvania searched Fisher's real estate office in conjunction with an investigation into allegations of real estate fraud generally, and theft by deception specifically. A number of audio cassette tapes were seized during the search. These tapes formed the basis of charges brought against Fisher for violating the Act by tape-recording conversations he had with others without their consent to the recordation in violation of 18 Pa.Cons. Stat. Ann. § 5703. (The text of section 5703 is set forth at Pet. App. E.)

The evidence at trial revealed that Fisher had recorded his telephone calls with nine individuals without the knowledge or consent of the individuals. Although Fisher told an investigator "that there was no law against taping in the Bahamas, and it was all right to tape here as long as it was related to your business," at trial he claimed that he did not intentionally record the conversations. (R.R. 254-55)[1] Other evidence established that Fisher was actually aware of the prohibition against tape recording conversations without consent. He told an employee that "as long as the other

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[1]Reference is to the Reproduced Record filed in the Superior Court of Pennsylvania.

person knows they're being taped, it's okay, it's legal." (R.R. 44) In fact, on one tape-recording heard by the jury, Fisher asked permission of the other party to record their conversation. (R.R. 34) Fisher testified that he had been told that tape-recording was not allowed. (R.R. 285-286)

Fisher requested that the trial judge instruct the jury that ignorance of the law was a complete defense. (Pet. C-13) The trial court declined to give the proposed instructions and gave an instruction that ignorance of the law was not a defense unless it negated a required specific intent to violate the law. (*Id.*) Fisher did not challenge the constitutionality of the Act.

The jury convicted Fisher of nine counts of illegal interception in violation of 18 Pa. Cons. Stat. Ann. § 5703. Post-trial motions were denied. He was sentenced to 11½ to 23 months imprisonment and fined $120,000.

On appeal, Fisher raised eight issues. (Pet. B-2--B-5) He renewed his challenge to the jury instructions. He did not present a constitutional challenge to the Act. The Superior Court of Pennsylvania affirmed the convictions, but reversed the fine. (Pet. Appendix B) The Pennsylvania Supreme Court denied allowance of appeal. (Pet. Appendix A)

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. This Court Should Deny Review Because Petitioner Never Presented the Federal Issue to the Pennsylvania Courts.

As noted in the statement of jurisdiction and the statement of the case, the question presented by petitioner was never presented below. Petitioner never argued that the Pennsylvania Act unconstitutionally conflicted with the less restrictive federal statute. Petitioner never argued that the Pennsylvania Act's criminalization of an "intentional" interception of a wire communication was unconstitutional. Pursuant to *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), this Court should deny.

### 2. Congress Did Not Preempt More Protective State Wiretapping Act Requirements.

Pennsylvania's Wiretapping and Electronic Surveillance Control Act is patterned after Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (Lawyers Co-op. 1979). The federal provisions were amended by the Electronic Communications Privacy Act of 1986. Pennsylvania enacted conforming amendments on October 21, 1988, P.L. 1000, No. 115. The federal statute allows a private party to a communication to intercept it. 18 U.S.C. § 2511(2)(d). The Pennsylvania Act only allows such interception where all parties to the communication give prior consent to the interception. 18 Pa. Cons. Stat. Ann. § 5704(4). Pennsylvania's adoption of a more restrictive statute does not violate the Supremacy Clause. U.S. Const. art. VI, cl. 2.

The federal wiretap statute reflects three congressional goals: to establish a standard of admissibility of wiretap evidence for federal court proceedings; to set a nationwide minimum standard for infringement upon citizens' privacy; and to allow states to create state statutory criteria which are more protective of citizens' privacy than the federal minimum standard. *See* 18 U.S.C. § 2516 (2); Senate Report No. 1097, 90th Cong., 2d Sess, 1968 U.S. Code Cong. & Ad. News 2180, 2187; *People v. Conklin*, 12 Cal. 3d 259, 266-73, 522 P.2d 1049, 1053-58, 114 Cal. Rptr. 241, 245-50 (1974), *appeal dismissed*, 419 U.S. 1064 (1974); and *Commonwealth v. Vitello*, 367 Mass. 224, 245-47, 327 N.E.2d 819, 832-34 (1975). The cases relied upon by petitioner do not stand for the proposition that states are preempted from protecting privacy to a greater extent than Congress.

Since Congress did not intend to preempt more protective state requirements (and, indeed, specifically intended to permit such laws), and since none of the provisions in the federal law conflicts with the application of more protective requirements in state criminal proceedings, the federal wiretap statute does not preempt the more rigorous Pennsylvania Act.

3. Petitioner Knew That Consent Was Required to Tape the Telephone Conversations. The Record Does Not Present the Issue He Raises.

The facts in this case prove beyond a reasonable doubt that Fisher actually knew that he could only tape-record a conversation with the consent of the other party. One tape-recording on which he sought consent to record (R.R. 34) and Fisher's own testimony (R.R. 285-286) are evidence of Fisher's knowledge that he needed mutual

consent before taping a conversation. He informed an employee that it was legal to tape with consent. (R.R. 44)

The facts of this case do not present a defendant who is ignorant of the law. The question which petitioner presents is premised upon a factual predicate which was not shown here.

4. The Requirement That a Defendant "Intentionally" Intercept in Order to Be Convicted of Violating the Act is Constitutional.

As noted above, petitioner never challenged the constitutionality of the Pennsylvania Act. In any event, the challenge presented is not worthy of review. A violation of 18 Pa. Cons. Stat. Ann. § 5703(1) is established when the Commonwealth proves that the defendant "intentionally intercept[ed] . . . any wire . . . communication." Fisher requested and was granted the following point for charge: "A person acts intentionally with respect to a material element of an offense when, if the element involves the nature of his conduct or result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result." (R.R. 301) Nowhere in his petition does Fisher explain how this instruction under the Pennsylvania Act violated the federal Constitution.

Fisher seems to suggest that Congressional amendments to Title III changing the *mens rea* requirement from "willful" to "intentional" (and conforming Pennsylvania amendments) were meaningless. The use of "willful" in Title III led to confusion and uncertainty. *Malouche v. J.H. Mgmt. Co.*, 839 F.2d 1024 (4th Cir. 1988). *Compare Citron v. Citron*, 722 F.2d 14, 16 (2d Cir. 1983) (requiring proof

of specific intent, intentional violation of known legal duty) *cert. denied*, 466 U.S. 973 (1984), with *United States v. Ross*, 713 F.2d 389, 391 (8th Cir. 1983). To remedy this situation Congress amended section 2511(1) in 1986 to substitute the term "intentional" in place of willful. Pennsylvania adopted the same change in 1988. Fisher cites no authority for his proposition that notwithstanding the amendment, to be constitutional, criminal wiretapping requires proof of a specific intent and that an honest mistake of law must be recognized as a defense.

No federal or state court has ever invalidated the Congressional determination that a criminal wiretapping violation could be proven by showing "intentional" conduct rather than a specific intent of "willfulness." At least one Court has upheld a conviction under the amended culpability provisions. *United States v. Townsend*, 987 F.2d 927 (2d Cir. 1993). Moreover, this is a question of statutory construction without an immediate constitutional dimension. Only if the federal statute were construed one way and then the Pennsylvania construction differed would the issue arise as to whether the Pennsylvania Act conformed to Title III, as amended. This Court should not entertain an issue not heretofore addressed in any reported decisions.

## CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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